In the Matter of JACK L. DAVIS, Claimant, v. OREGON CHIP TERMINAL, INC., Employer, and SAIF CORPORATION, Carrier.	Date: February 19, 1999 OALJ Case No. 1998-LHC-351; 1998-LHC-352 OWCP Case No. 14-117644; 14-113476

Appearances:

Charles Robinowitz, Esq.
Portland, Oregon
for Claimant

John Dudrey, Esq.
Williams, Fredrickson, Stark & Littlefield, P.C.
Portland, Oregon
for Employer and Carrier

Before: Anne Beytin Torkington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

Claimant, Jack L. Davis, filed a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq*. ("the Act"), for injuries suffered on August 27, 1992 and May 13, 1994, while he was working for the Employer, Oregon Chip Terminal, Inc. A formal hearing was held in Portland, Oregon on October 22, 1998. All parties, except the Director of the OWCP, were represented by counsel. The following exhibits were admitted into evidence: Claimant's Exhibits ("CX") 1-58, Employer's Exhibits ("EX") 1-36, and Administrative Law Judge's Exhibit ("ALJX") 1-2. The parties called witnesses, offered documentary evidence and submitted oral arguments. This Court took the matter under submission and invited post-trial briefs by the parties which were subsequently submitted. This Court duly considered the evidence submitted at trial, the admitted exhibits, and the briefs and arguments of counsel.

Claimant argues that the date of maximum medical improvement for the knee injury is

June 30, 1994. Claimant argues that he is entitled to temporary total disability for the date November 1, 1993 as well as interest for delayed payments of temporary disability benefits. Claimant argues that his average weekly wage for the knee injury should be calculated based on the date he first became disabled, August 23, 1993. Claimant argues that the time period when he was receiving disability benefits for his knee injury should be excluded from his average weekly wage computation for the neck injury. Claimant also argues that he is permanently totally disabled for his neck injury. In addition, Claimant argues that he is entitled to a Section 14(e) penalty.

Employer argues that the date of maximum medical improvement for the 1992 injury is April 22, 1995. Employer argues that Claimant's average weekly wage should be calculated based on his date of injury of August 27, 1992. Employer argues that the time period in which Claimant was receiving disability benefits for his knee injury should not be excluded for purposes of calculating his average weekly wage for the subsequent neck injury. Employer also argues that Claimant has a residual earning capacity, and is entitled to permanent partial disability benefits of $543.15 per week for his 1994 neck injury. In addition, Employer argues that Claimant is not entitled to a Section 14(e) penalty.

I agree with Claimant regarding the calculation of the average weekly wage for both injuries. I agree with the Employer that April 22, 1995 is the date of maximum medical improvement for the knee injury. Claimant is permanently totally disabled as a result of the neck injury. Claimant is not entitled to a Section 14(e) penalty.

STIPULATIONS

The parties stipulate, and I accept that:

1. The parties were subject to the provisions of the Act.

2. Claimant and Employer were in an employer/employee relationship at the time the injuries occurred.

3. Claimant injured his left knee on August 27, 1992, and injured his neck on May 13, 1994.

4. The injuries arose out of and in the course of employment.

5. Employer received timely notice of the alleged injuries.

6. Claimant filed timely claims for compensation.

7. Employer filed timely notices of controversion on June 1, 1993 and January 24, 1996.

8. The date of maximum medical improvement regarding the neck injury is June 7, 1996.

9. Employer voluntarily paid compensation for temporary total disability from August 23, 1993 to November 1, 1993, a period of 9 and 6/7 weeks, at the rate of $699.96 per week for a total sum of $6,899.61. Since October 5, 1994, Claimant continues to receive compensation at the rate of $680.75 per week.

10. Employer/Carrier has paid for all medical services under Section 7.

11. Claimant has incurred a permanent partial disability of 26 percent for his left leg based on the report of Dr. Kenneth Freudenberg dated December 9, 1996.

12. Employer is entitled to a credit for the knee injury for prior awards of $11,087 and $22,167.94.

13. The Director, OWCP, stipulates that Employer is entitled to Section 8(f) relief if Claimant is found permanently disabled commencing no earlier than June 7, 1996.[1]

TR[2] pp.4-6.

ISSUES FOR DETERMINATION

The unresolved issues in this proceeding are:

1) What is Claimant's Average Weekly Wage for both injuries?

2) What is the date of maximum medical improvement regarding the knee injury?

3) What is the extent of Claimant's disability resulting from the neck injury?

4) What is the extent of Claimant's wage earning capacity, if any?

TR pp.6-7.

FINDINGS OF FACT

Claimant was born on March 20, 1938. TR p.39. He graduated from high school in Southern California, and has worked as a longshoreman since 1955. TR pp.39-40. Claimant was

[1]The Director submitted its stipulation via a letter dated October 8, 1998. ALJX 2.

[2]The abbreviation "TR" refers to the hearing transcript.

an "A" registered longshoreman with Local 12 of the ILWU[3] in North Bend, Oregon at the time of his injuries. TR p.43.

August 1992 Knee Injury

On August 27, 1992, while working as a chip sampler at Employer's wood chip facility in Coos Bay, Oregon, Claimant injured both of his knees when he slipped and fell in a hole. TR pp.42-43; CX 1; EX 1. He initially treated with Dr. Thomas McAndrew, his family doctor, on that same day. Dr. McAndrew diagnosed Claimant with contusions to both knees, and prescribed ibuprofen. Dr. McAndrew indicated that light duty was not necessary. Dr. McAndrew also noted that Claimant had a prior knee surgery in 1977, but had no sequelae since then.[4] CX 1.

Claimant continued to work and treat with Dr. McAndrew. On September 15, 1992, Dr. McAndrew noted that Claimant experienced burning pain in his knees. There was no locking, popping or effusions. Dr. McAndrew found crepitus in the left knee and diagnosed Claimant with mild patellar tendonitis. Dr. McAndrew indicated that he would refer Claimant to Dr. Freudenberg if his condition did not improve. CX 2.

Dr. Kenneth Freudenberg examined Claimant on December 8, 1992. Dr. Freudenberg diagnosed Claimant with degenerative joint disease of the left knee with a recent superimposed sprain and "patellofemoral chondromalacia" in both knees. Dr. Freudenberg recommended conservative treatment and referred Claimant back to Dr. McAndrew. CX 5.

On May 13, 1993, Dr. McAndrew noted that Claimant had persistent problems with effusion and a burning sensation in his left knee. Dr. McAndrew decided to refer Claimant back to Dr. Freudenberg for possible arthroscopic surgery. CX 6.

Dr. Freudenberg examined Claimant on May 17, 1993, and recommended arthroscopic knee surgery because he suspected a lateral meniscus tear in Claimant's left knee. Dr. Freudenberg opined that the meniscus tear was probably the result of his 1992 industrial injury. Claimant's knee surgery was scheduled for June 2, 1993. CX 7.

On June 1, 1993, Employer controverted Claimant's right to compensation because Employer determined that the current need for medical treatment was not related to Claimant's August 1992 industrial injury. EX 3. On July 9, 1993, Dr. William Duff examined Claimant on Employer's behalf. Dr. Duff found that Claimant's knee complaints were caused, at least in part, by his August 1992 industrial injury. Dr. Duff recommended that Claimant undergo an MRI

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[3]The record does not reflect what "ILWU" refers to.

[4]Claimant had two prior industrial injuries to his left knee resulting in knee surgery in 1977 and 1981. EX 29.3, pp.57-59; EX 29.7, pp.78-79. As a result, Claimant received an $11,087 disability award in 1978 and a $22,167.94 disability award in 1983. CX 26, 27.

examination before undergoing knee surgery. Dr. Duff also stated that Claimant could continue with his regular work. CX 9.

Claimant underwent an MRI on August 23, 1993. The MRI showed moderate swelling, but no evidence of a lateral meniscus tear or ligament abnormality. CX 10. Dr. Freudenberg performed knee surgery on August 25, 1993, and found significant chondromalacia which he debrided. CX 12, 13.

Claimant was off of work from August 23, 1993 through November 1, 1993. CX 11, 15, 16. Following his return to work, Claimant continued to treat with Dr. Freudenberg. CX 20. Claimant was fitted for a knee brace in October 1994. CX 21.

On December 14, 1994, Drs. John D. White and William S. Mayhall examined Claimant on behalf of Employer. Drs. White and Mayhall found that Claimant's condition was medically stationary at that time with some permanent disability. CX 22, p.39.

On August 20, 1996, Dr. Freudenberg issued a report that stated he had reviewed Claimant's file. Dr. Freudenberg indicated that Claimant's knee injury became permanent and stationary on April 24, 1995. However, Dr. Freudenberg also stated that "I also could not argue about the December 14, 1994 evaluation where those physicians felt that he was medically stationary regarding his left knee at that time." CX 24. On December 9, 1996, Dr. Freudenberg found that Claimant had a 26% of the whole man permanent impairment to the lower extremity. CX 25.

May 1994 Neck Injury

On May 13, 1994, Claimant injured his neck when he bumped his head on a structural beam near Employer's wood chip dump in Coos Bay.[5] Claimant initially treated with Dr. McAndrew on June 7, 1994. CX 28, p.59. Dr. McAndrew diagnosed Claimant with a neck sprain and recommended conservative treatment. Claimant continued to work. CX 28, p.60. On July 1, 1994, Dr. McAndrew referred Claimant to Dr. Russell J. Keizer, an orthopedic surgeon, because of persistent neck pain. CX 31.

Dr. Keizer examined Claimant on July 26, 1994, and recommended continued conservative treatment. CX 32. Physical therapy did not relieve Claimant's pain complaints. A cervical MRI performed on August 16, 1994 revealed a two-level disc herniation at C4-5 and C6-7. CX 34.

Claimant stopped working as of October 5, 1994 because of continued neck pain. On October 28, 1994, Dr. Keizer recommended neck surgery. CX 36. Dr. Keizer performed neck

[5]Claimant had a prior industrial neck injury in 1983 that resulted in neck surgery in 1984. EX 29.11.4, pp.101-103.

surgery — anterior cervical spine fusion at C4-5 and C6-7 — on July 13, 1995. CX 42. On July 18, 1995, Dr. Keizer performed a second operation to repair the fusion after the C4-5 bone plug broke. CX 43.

After the surgery, Claimant continued to be totally disabled. On April 16, 1996, Dr. Keizer stated that Claimant will not be able to return to his regular work. CX 49. On October 30, 1996, Dr. Keizer again stated that Claimant cannot return to his regular work. Dr. Keizer recommended sedentary work with minimal use of his upper extremities. Claimant should avoid pushing, pulling, overhead work and work with vibrating tools or machines. CX 51.

Vocational Evidence

Claimant testified that he took a medical retirement in November 1996 as a result of his neck injury. At that time he had 32 qualifying years of employment. The maximum possible is 35 years. TR p.42. Claimant testified that he also applied for and received social security disability benefits. TR p.42.

Claimant also testified about his prior employment. In addition to working as a longshoreman, Claimant worked as a spray rig driver for an insect spraying contractor. He also worked in a foundry, loading and unloading a furnace, pouring off molten metal, and operating the furnace and pouring controls. In high school, Claimant worked as a cashier at a gas station. Claimant acknowledged that he was fairly good at arithmetic. TR p.40.

Claimant's wife, Angelita Davis, testified on behalf of Claimant. TR pp.27-28. They moved from Coos Bay to Roseburg in April 1998 in order to be closer to their children and grandchildren. Both Claimant and his wife needed help from their children because of health problems. TR pp.29-30. Roseburg is approximately 85 miles from Coos Bay.[6] TR p.30. Mrs. Davis testified that in her opinion Claimant would not be able to work as a desk clerk at a hotel because he is not a social person and he could not handle the books or telephone. Claimant's writing is poor, and his spelling is bad. TR p.32

Claimant underwent a physical capacities evaluation on July 16, 1997 at Progressive Rehabilitation Associates ("PRA"). PRA determined that Claimant could perform full-time work in the "Light Range of Physical Demands." Claimant had significant limitations in overhead reaching, squatting, kneeling, and stair/step climbing. EX 32, p.188.

Dr. Holmes examined Claimant on July 16, 1997 in conjunction with the physical capacities evaluation. Dr. Holmes found that the evaluation was valid and that Claimant was limited to light work. EX 32, p.197. Dr. Holmes also reviewed job analyses for the positions of newspaper delivery driver/carrier, gambling cashier, maintenance service dispatcher, hospital cleaner, cashier, motel desk reservation clerk, and information clerk/referral aide. Dr. Holmes

[6]Employer stipulates that Claimant moved to Roseburg for legitimate reasons. TR p.79.

opined that Claimant could perform the gambling cashier, maintenance service dispatcher, cashier, and motel desk reservation clerk without modifications. Dr. Holmes found that the newspaper delivery driver/carrier and information clerk/referral aide positions were not physically appropriate. Dr. Holmes also found that the hospital cleaner position would be appropriate if modifications could be made to eliminate overhead reaching and minimize reaching at an arms length. EX 32, p.198.

Dr. Keizer, in response to a questionnaire from Ms. Areta Sturges, Employer's vocational expert, indicated that he agreed with Dr. Holmes' findings. Dr. Keizer added that Claimant may have some problems with standing for the cashier and dispatcher positions. EX 32, p.220.

Ms. Sturges issued a report dated September 30, 1997. EX 33. She reviewed, *inter alia*, Claimant's medical file, physical capacities evaluation, and job analyses. She conducted a labor market survey for motel desk clerk and cashier positions. In addition, Ms. Sturges interviewed Claimant on December 12, 1997. She determined that positions of cashier and motel desk clerk were available as suitable alternative employment in Coos Bay and North Bend, Oregon. The average wage for the cashier positions was $6.92 per hour, and the average wage for the motel desk clerk positions was $6.03 per hour. EX 33, pp.289-291.

Claimant underwent a work capacity evaluation at Asante Health System on August 27, 1998. EX 34. Claimant was evaluated to assess his ability to perform the positions of cashier and motel desk clerk. During the evaluation Claimant was unable to perform all of the functional requirements of the positions due to weakness and swelling in his left knee, decreased right shoulder range of motion, decreased cervical mobility and decreased right hand grip strength and dexterity. However, Claimant would be able to perform the duties of a motel desk clerk if he was limited to a four hour shift and provided with a sit/stand stool, an adjustable-height monitor arm for a computer monitor, and an articulated keyboard. EX 34, pp.299-300.

Ms. Sturges conducted a second labor market survey for motel clerks in Coos Bay and Roseburg in September 1998. EX 35. She again interviewed Claimant on September 3, 1998. TR pp.70-71. Ms. Sturges concluded that since June 1996, there have been openings for motel desk clerks in Coos Bay and Roseburg on both a full-time and part-time basis. TR pp.75-76.

CONCLUSIONS OF LAW

Average Weekly Wage For Knee Injury

In traumatic injury cases, an employee's average weekly wage is determined as of the time of injury for which compensation is claimed. See 33 U.S.C. § 910; *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140 (1991); *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991). In an occupational injury case, which does not immediately result in disability or death, an employee's average weekly wage is determined as of "the date on which the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical

advice should have been aware, of the relationship between the employment, the disease, and the death or disability." 33 U.S.C. § 910(i).

Claimant argues that his average weekly wage should be calculated based on his date of disability rather than the date of injury because his disability was not manifest until one year after the date of injury. Employer argues that the date of injury is controlling because Claimant suffered a traumatic injury.

Claimant argues that this case is controlled by *Johnson v. Director, OWCP*, 911 F.2d 247 (9th Cir. 1990). In *Johnson*, the Ninth Circuit determined that in cases involving a latent traumatic injury, a claimant's average weekly wage is to be calculated at the time the disability becomes manifest, rather than at the time of the accident. The Ninth Circuit reasoned that latent traumatic injuries are similar to occupational diseases, as the effect of the injury or disease is not known until a disability becomes manifest. The claimant worked intermittently after her injury but experienced continued pain and increased swelling in her hands until she had to stop working approximately three and one half years after the date of accident. Thus, the court held that Johnson was not "injured" until several years after her accident when her disability became manifest, and it used the later date for purposes of determining her average weekly wage. *Id*. at p.250.

The Second and Fifth Circuits have held that in traumatic injury cases, the time of injury is the date the event causing the injury occurred; thus, the average weekly wage is determined at the time of the initial injury, and not when any disability becomes manifest. See *LeBlanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157 (5th Cir. 1997); *Director, OWCP v. General Dynamics Corp. [Morales]*, 769 F.2d 66 (2nd Cir. 1985). The courts reasoned that this interpretation is consistent with the plain language of the Act. In addition, the Board has elected to follow *LeBlanc* and *Morales* and has rejected *Johnson* in cases outside the Ninth Circuit. See *McKnight v. Carolina Shipping Co.*, ___ BRBS ___, BRB No. 97-618 (Nov. 18, 1998) (*en banc*); but see *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (Sept. 27, 1995) (Board elected to follow *Johnson* in latent traumatic injury case arising in the D.C. Circuit).

I agree with Claimant that since this case arises in the Ninth Circuit, *Johnson* is controlling. However, Employer argues that *Johnson* is an exceptional case and the facts here preclude its applicability. I disagree. Here, like *Johnson*, Claimant suffered a traumatic injury that was not initially disabling. Claimant received ongoing medical treatment, but he continued to perform his usual work. In *Johnson*, claimant's disability became manifest over three and one half years after the date of the accident. Here, Claimant became temporarily disabled approximately one year after the date of the accident. Indeed, the facts here are more compelling than in *Johnson*. In *Johnson*, the claimant worked intermittently after the date of accident, whereas here, Claimant continued to perform his regular work on a full-time basis. As such, Claimant's continued ability to perform his regular work essentially masked any disability. Claimant did not become disabled until he had knee surgery one year after the accident date.

Employer's reliance on *Fox v. West State Inc.*, 31 BRBS 118 (Sept. 29, 1997), is

misplaced. In *Fox*, the claimant suffered a back injury on August 17, 1993, and subsequently became disabled on November 29, 1993, when he stopped working. In a very brief opinion, the Board noted that *Johnson* did not apply because the claimant's work pattern after August 17 was "spotty." The Board stated that *Johnson* only applied in cases where the effect of a traumatic injury is latent. Here, unlike *Fox*, Claimant's work record after the date of accident was not "spotty." Claimant continued to perform his usual work on a full-time basis up until the time of his disability. TR p.46. In addition, Claimant became disabled approximately one year after the accident date, whereas in *Fox*, claimant became disabled only three months after the accident date. Finally, in Fox, claimant originally argued before the administrative law judge that the average weekly wage should be calculated from the injury date, not the date of disability.

Pursuant to *Johnson*, I must determine the date that Claimant first became disabled. According to the medical records and the Carrier's disability payment records, Claimant first became disabled on August 23, 1993. CX 11, 15, 16. As such, Claimant's average weekly wage will be calculated based on this date. The parties stipulate and I accept that Claimant's average weekly wage is $1099.02, if August 23, 1993 is the controlling date. ALJX-1.

Average Weekly Wage for Neck Injury:

Both Claimant and Employer argue that Claimant's average weekly wage for the neck injury should be calculated under Section 10(c).

Section 10 of the Act sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), to arrive at an average weekly wage. The computation methods are directed towards establishing a claimant's earning power at the time of injury. See *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (1992); *Lobus v. I.T.O. Corp.*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978).

The calculation methods of Sections 10(a) and 10(b) are applicable where an injured employee's work is regular and continuous. Section 10(a) applies if the employee "worked in the employment . . . whether for the same or another employer, during substantially the whole of the year immediately preceding" the injury. 33 U.S.C. § 910(a); See *Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991); *Duncan v. Washington Metro. Area Tranist Auth.*, 24 BRBS 133 (1990). Section 10(a) looks to the actual wages of the injured worker. See 33 U.S.C. §910(a).

Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for "substantially the whole of the year," prior to his injury. Section 10(b) looks to the wages of other workers in the same employment situation and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. See 33 U.S.C. § 910(b).

Section 10(c) should be applied in cases where the methods used in subsections (a) and (b) cannot reasonably and fairly be applied. See 33 U.S.C. § 910(c).

I agree with the parties that Claimant's average weekly wage should be calculated pursuant to Section 10(c). Section 10(a) is not applicable because Claimant did not work for substantially the whole year preceding the injury. Likewise, Section 10(b) is not applicable because there is no evidence in the record of wages earned by a comparable employee during the year preceding the injury. Since neither Sections 10(a) nor 10(b) applies, the average weekly wage must be calculated under Section 10(c).

The administrative law judge has broad discretion in determining annual earning capacity under Section 10(c). See *Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991). The objective of Section 10(c) is to reach a fair and reasonable approximation of the claimant's annual wage-earning capacity at the time of the injury. See *Empire United Stevedores v. Gatlin*, 936 F.2d 819 (5th Cir. 1991). It is well settled that the administrative law judge may consider the wages claimant would have earned in the year preceding the injury but for a personal illness, auto accident or union strike. See e.g., *Hawthorne v. Director, OWCP*, 844 F.2d 318 (6th Cir. 1988); *Browder v. Dillingham Ship Repair*, 24 BRBS 216 (1991); *Klubniken v. Crescent Wharf & Wharehouse Co.*, 16 BRBS 182 (1984).

Claimant argues that the date July 9, 1993,[7] and the period from August 23, 1993 to November 2, 1993 should be excluded from calculating Claimant's average weekly wage because he was temporarily totally disabled due to his left knee surgery. Claimant argues that he would have worked during this period but for his temporary disability from the knee surgery.

Employer, relying on *Browder* and *Klubnikin*, argues against factoring out the period in which Claimant did not work and was disabled. In addition, Employer argues that Claimant should not be compensated for any permanent reduction in wage-earning capacity as a result of the 1992 knee injury. I agree with the Employer that the period in dispute should not be factored out because under Section 10(d) the divisor for calculating the average weekly wage must always be 52. However, Claimant's earnings for the period that he actually worked can be extrapolated to cover the period in which he did not work. See *Hawthorne*, *supra*.

In *Klubnikin*, the claimant was unable to work in the year prior to the compensable injury because of a non-industrial automobile accident. The Board held that when a claimant is unable to work due to injury in the year preceding an injury for which compensation is sought, that factor must be taken into account in determining the average weekly wage if the annual earning capacity is based on earnings in the year preceding the compensable injury. See *Klubnikin*, *supra*; See also *Browder*, *supra* (ALJ has discretion to include in the AWW the period that claimant would have worked but for attending her mother's funeral).

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[7]Claimant was examined by Employer's medical experts on July 9, 1993.

The circumstances here are similar to *Klubnikin*. Claimant was unable to work during part of the year prior to his neck injury because of his knee injury. Like the automobile accident in *Klubnikin*, this was a circumstance beyond Claimant's control. Employer does not dispute that Claimant would have worked for the entire year but for the knee injury. Instead, Employer argues that Claimant's prior knee injury permanently reduced his wage earning capacity. As evidence, Employer relies on Claimant's testimony that his knee was never the same and he had difficulty climbing ladders and gangways. While this testimony illustrates that Claimant did suffer some permanent partial disability as a result of the 1992 knee injury — the parties stipulated that Claimant has a 26% permanent partial disability — it does not establish a permanent reduction in earning capacity. Claimant returned to his regular work after recovering from knee surgery and he continued to work until he became disabled as a result of the neck injury. The medical records do not suggest that Claimant would have lost additional time from work as a result of his knee injury absent the neck injury. Likewise, there is no evidence to suggest that the Employer was providing "sheltered" employment.

During the 52 weeks prior to the May 13, 1994 injury, Claimant earned $47,441.16. This amount does not accurately reflect his annual earning capacity because he was unable to work for part of the year while out on disability. Therefore, pursuant to *Hawthorne*, it is necessary to divide the actual earnings of $47,441.16 by the number of weeks actually worked by Claimant in the year prior to his injury. This number should then be multiplied by the number of weeks that Claimant was off on disability due to his knee injury to show what he would have earned but for the disability period. This figure when added to his actual earnings of $47,441.16 generates a fair approximation of Claimant's annual earning capacity pursuant to Section 10(c). This final figure should then be divided by 52 pursuant to Section 10(d) to arrive at Claimant's average weekly wage. The parties stipulate and I accept that if Claimant's wages should be adjusted to reflect what he would have earned while he was out on disability then his average weekly wage would be $1,137.00. ALJX 1, p.4. Therefore, since I find that Claimant's wages must be adjusted to reflect what he would have earned absent his disability from the knee injury, his average weekly wage is $1,137.00 which computes to a compensation rate of $738.30 (maximum) per week.

Section 14(e) Penalty

Claimant argues that he is entitled to a Section 14(e) penalty regarding the calculation of his average weekly wage for his neck injury. Beginning October 5, 1994, Employer voluntarily paid temporary total disability benefits at the rate of $680.75 per week based on an average weekly wage of $1021.13. CX 53. Claimant is entitled to the maximum compensation rate of $738.30 based on an average weekly wage of $1,137.00. Claimant argues that he is entitled to a penalty for the period October 5, 1994 to April 17, 1996, the date of the informal conference, because the Employer failed to file a timely notice of controversion.

Initially, I note that Claimant did not raise this issue at the hearing.[8] However, the Board

[8]Claimant did raise the Section 14(e) penalty issue in his pre-trial statement.

has held that the assessment of additional compensation under Section 14(e) is mandatory and may therefore be raised at any time. See *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). The Employer does not argue any prejudice, and it fully briefed the issue in its post trial brief.

Employer does argue that Claimant's request for a penalty is contrary to his stipulation at the hearing. At the hearing the parties stipulated that the Employer filed timely notices of controversion on June 1, 1993 and January 24, 1996. TR p.5. However, neither of these stipulations involved the average weekly wage dispute for Claimant's neck injury. Employer's June 1, 1993 notice controverted Claimant's entitlement to medical treatment for the knee injury. EX 3. Employer's January 24, 1996 notice controverted Claimant's compensation rate and claim for interest regarding the knee injury. No reference was made to the compensation rate for the neck injury. EX 11. Therefore, I find that Claimant's stipulations at the hearing do not preclude his request for a Section 14(e) penalty.

Section 14(e) of the Act provides:

> If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. § 914(e).

The employer's good faith is not relevant to Section 14(e). See *Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385 (D.C. Cir. 1979). However, a Section 14(e) penalty will not be assessed where the employer timely controverts the claim, even where the case ultimately results in an unfavorable disposition to the employer. See *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980).

A claimant's request for additional compensation based on a higher average weekly wage followed by the employer's refusal to pay constitutes a controversy for purposes of Section 14, and the employer must file a notice of controversion within 14 days from the date of controversy in order to avoid a Section 14(e) penalty. See *Browder v. Dillingham Ship Repair*, 25 BRBS 88 (1991).

Employer argues that since it never received notice of the controversy prior to the date of the informal conference it was not required to file a notice of controversion. In *National Steel & Shipbuilding Co. v. U.S. Dept. of Labor, OWCP*, 606 F.2d 875 (9th Cir. 1979), the Ninth Circuit explained the circumstances under which an employer must file a notice of controversion in order to avoid liability for a penalty. The court stated:

> [T]he notice requirement is not triggered until the employer has reason to believe a controversy will arise, whether because of the employer's own actions in terminating or reducing benefits previously paid voluntarily or because of an employee's protests or claims with respect to compensation. Once the employer has reason to believe that a controversy has arisen or will arise, however, it must file the notice of controversion within 14 days or be liable for the 10 percent assessment computed on all amounts unpaid between the time notice should have been filed and the time notice is filed (or the time the Department of Labor acquires knowledge of the facts that a proper notice would have revealed).

Id. at 879.

Claimant argues that it notified the Employer of a dispute regarding the compensation rate by way of a letter dated January 22, 1996. However, this letter is not in the record. In addition, Claimant did not offer any documentary or testimonial evidence regarding the alleged notification. Instead, Claimant argues that the OWCP memorandum of the informal conference dated April 17, 1996 establishes that the Employer was aware of the dispute on January 22, 1996. The OWCP memorandum states: "AWW on neck claim per letter dated 1-22-96." CX 54, p.114. While Claimant is correct that this memorandum does reference a January 22nd letter, it does not establish that the Employer was aware of or should have been aware of the compensation rate dispute at that time. The memorandum does not identify the author of the letter, nor the recipient. Likewise, the memorandum does not describe the substance of the letter. At best, this memorandum indicates that the Employer was aware of the compensation rate dispute <u>at the time of the informal conference on April 17, 1996</u>. Therefore, I find that the Claimant has failed to establish that the Employer was aware of the dispute <u>prior</u> to the informal conference. And since liability for a Section 14(e) penalty terminates on the date the employer files the notice of controversion or on the date of the informal conference, whichever occurs first (See *National Steel & Shipbuilding Co., supra*.), Claimant is not entitled to a Section 14(e) penalty.

<u>Date of Maximum Medical Improvement for Knee Injury</u>

Claimant argues that the date of maximum medical improvement for Claimant's knee injury is June 30, 1994, while Employer argues that it is April 24, 1995.

"Maximum medical improvement" and "permanent and stationary" are legal concepts developed in case law to ascertain when a claimant's condition has moved from a temporary to a permanent status. The AMA Guides for the Evaluation of Permanent Impairment, 4th ed. (1993) also offer some guidance:

> **Report of medical Evaluation (Permanent Medical Impairment)**
> . . . . . .
> **4. Stability of the medical condition**
>
> a. The clinical condition is stabilized and not likely to improve with surgical

intervention or active medical treatment; medical maintenance care only is warranted.

b. The degree of impairment is not likely to change substantially within the next year.

c. The patient is not likely to suffer sudden or subtle incapacitation.

AMA Guides, p.11.

A disability will be considered permanent if the employee's impairment has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). See also *Crum v. General Adjustment Bureau*, 738 F.2d 474, 480 (D.C. Cir. 1984) (physician's evaluations of claimant indicated that his heart condition, although improved, was of indefinite duration); *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 781-782 (1st Cir. 1979); *Care v. Washington Metro. Area Transit Auth.*, 21 BRBS 248, 251 (1988).

Permanency does not, however, mean unchanging. Permanency can be found even if there is a remote or hypothetical possibility that the employee's condition may improve at some future date. *Watson*, 400 F.2d at 654; *Mills v. Marine Repair Serv.*, 21 BRBS 115, 117 (1988); *Brown v. Bethlehem Steel Corp.*, 19 BRBS 200, 204, *aff'd on recon.*, 20 BRBS 26 (1987). Likewise, a prognosis stating that chances of improvement are remote is sufficient to support a finding that a claimant's disability is permanent. *Walsh v. Vappi Constr. Co.*, 13 BRBS 442, 445 (1981); *Johnson v. Treyja, Inc.*, 5 BRBS 464, 468 (1977).

The date a claimant's condition becomes permanent is a question of fact to be determined by the medical evidence and not by economic or vocational factors. Thus, the medical evidence must establish the date on which the claimant has received the maximum benefit of medical treatment such that his condition is not expected to improve. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 60 (1985); *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). If a physician does not specify the date of maximum medical improvement, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See *Jones v. Genco, Inc.*, 21 BRBS 12 (1988).

Before an injured worker's condition can be found to be permanent, both physical and mental factors must be considered. Hence, where the claimant suffered both physical and emotional trauma and needed psychological treatment before he could return to work, he was not yet at the point of maximum medical improvement and was still considered disabled due to the psychological effects of his injury. *Jenkins v. Kaiser Aluminum & Chem. Sales*, 17 BRBS 183, 187 (1985).

Where surgery is anticipated, maximum medical improvement has not yet been reached. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). However, if anticipated surgery is not expected to improve a claimant's condition or if a claimant reasonably refuses to undergo surgery,

the condition may be considered permanent. *Phillips v. Marine Concrete Structures*, 21 BRBS 233 (1988); *Worthington v. Newport News Shipbuilding and Dry Dock Company*, 18 BRBS 200 (1986).

On August 20, 1996, Dr. Freudenberg issued a report that stated he had reviewed Claimant's file. Dr. Freudenberg indicated that Claimant's knee injury became permanent and stationary on April 24, 1995. However, Dr. Freudenberg also stated that "I also could not argue about the December 14, 1994 evaluation where those physicians felt that he was medically stationary regarding his left knee at that time." CX 24.

Claimant argues that Dr. Freudenberg's opinion is suspect because he did not thoroughly review his medical records. Claimant suggests that Dr. Freudenberg probably dictated his August 20, 1996 report by memory and did not review his chart notes at that time. I decline Claimant's invitation to engage in such speculation. There is no evidence in the record to suggest that Dr. Freudenberg was careless in selecting a date of maximum medical improvement. In fact, Dr. Freudenberg specifically stated in his August 20, 1996 report that he had reviewed Claimant's file.

Next, Claimant provides three reasons why June 30, 1994 is the most logical date of maximum medical improvement. First, this date is ten months after the arthroscopic surgery. Second, Claimant testified that he felt his left knee had reached maximum medical improvement before he hurt his neck on May 13, 1994. Third, on June 30, 1994, Dr. Freudenberg discontinued Claimant's anti-inflammatory medication and indicated that he should continue with home exercises, and that he would see him back as necessary. None of these facts are convincing. There is no medical opinion from any physician indicating that June 30, 1994 is the date of maximum medical improvement. And, Claimant underwent a bone scan and received a knee brace in October 1994 which indicates that his condition was not yet stabilized on June 30, 1994. In sum. I reject Claimant's argument that he reached maximum medical improvement on June 30, 1994.

Employer argues that Claimant reached maximum medical improvement on April 24, 1995 based on the opinion of the treating physician, Dr. Freudenberg. On August 20, 1996, Dr. Freudenberg opined that Claimant's maximum medical improvement date was April 24, 1995. Dr. Freudenberg had examined Claimant on April 24, and found that his knee brace at that time was working well. Dr. Freudenberg also stated that he could not "argue" with Drs. White's and Mayhall's conclusion that December 14, 1994 was the maximum medical improvement date. However, Dr. Freudenberg specifically determined that April 24, 1995 was the maximum medical improvement date. EX 22. As the treating physician, Dr. Freudenberg's opinion is entitled to great weight. See *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). Drs. White and Mayhall did not state why Claimant's condition was medically stationary on December 14, 1994. CX 22, p.39. As such, I find Dr. Freudenberg's opinion more persuasive than the opinions of the examining physicians, Drs. White and Mayhall. Claimant's date of maximum medical improvement is April 24, 1995.

Extent of Disability for Neck Injury

In order to establish permanent total disability, a claimant must prove by a preponderance of the evidence that he is unable to perform his usual job due to his work related injury. See *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989). The judge must compare the claimant's medical restrictions with the specific requirements of his usual employment. See *Curit v. Bath Iron Works Corp.*, 22 BRBS 100 (1988). At this initial stage, claimant need not establish that he cannot return to any employment, only that he cannot return to his former employment. See *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). Usual employment is the claimant's regular duties at the time he was injured. See *Ramirez v. Vessel Jeanne Lou, Inc.*, 14 BRBS 689 (1982). The claimant's credible complaints of pain alone may be enough to meet his burden. See *Anderson, supra*. However, a judge may find a claimant able to do his usual work despite his subjective complaints, when a physician finds no functional impairment. See *Peterson v. Washington Metro. Area Transit Auth.*, 13 BRBS 891 (1981).

The parties agree that Claimant cannot return to his usual work as a result of his neck injury. I also note that the weight of the evidence indicates that Claimant cannot return to his usual work. Dr. Keizer, Claimant's treating physician, indicated that Claimant could not return to his usual work. CX 51. There is no contrary medical evidence in the record. In sum, I find that Claimant cannot return to his usual work.

Retained Earning Capacity

Since Claimant has established that he cannot return to his regular work, he will be considered permanently totally disabled unless the employer establishes suitable alternative employment. See *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). The employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions. See *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473 (1978). If the employer meets its burden and establishes suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See *Edwards v. Director, OWCP*, 999 F.2d 1374 (9th Cir. 1993); *Williams v. Halter Marine Service*, 19 BRBS 248 (1987).

The judge may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. See *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232 (1985). The counselors must identify specific available jobs; labor market surveys are not enough. See *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380 (1983). The judge may credit a vocational expert's opinion even if the expert did not examine the claimant, as long as the expert was aware of the claimant's age, education, industrial history, and physical limitations when exploring the local job opportunities. See *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Employer argues that the position of motel desk clerk is suitable alternative employment.

In a August 26, 1997, labor market survey, Ms. Sturges contacted seven potential employers in the Coos Bay and North Bend areas regarding motel desk clerk positions. All seven employers indicated that Claimant was qualified for the positions. At that time, there were no current job openings, but two openings were anticipated in the next 12 months. There had been four job openings between June 7, 1996 and August 26, 1997. EX 32, pp.260-261.

Ms. Sturges conducted a second labor market survey on September 1, 1998 in which she contacted eight potential employers in the Roseburg area. Seven of the employers indicated that Claimant was qualified for the position. At that time, there was one part-time job opening, and it was anticipated that there would be seven full-time and eight part-time positions available in the next 12 months. Eighteen full-time and 24 part-time positions were available from June 7, 1996 to September 1, 1998. EX 35, pp.317-318.

Ms. Sturges also conducted an updated labor market survey of the Coos Bay/North Bend area on September 15, 1998. EX 35, pp.335-336. She contacted 11 potential employers, eight of which indicated that Claimant was qualified for the positions. At that time, there was one part-time opening, and it was anticipated that there would be one full-time and six part-time openings in the next 12 months. Twelve full-time and seven part-time positions were available from June 7, 1996 to September 15, 1998. EX 35, pp.335-336.

Claimant argues that Employer has failed to establish suitable alternative employment for five reasons. First, Claimant argues that he lacks the basic skills to be a motel desk clerk. Specifically, Claimant argues that he has poor spelling, writing, and bookkeeping skills. Claimant's concerns are misplaced. Ms. Sturges testified that a motel desk clerk position is an entry level job that does not require bookkeeping skills; rather, the position requires basic math skills such as addition, subtraction and possibly the ability to calculate a percentage discount. TR pp. 72-73. Claimant is a high school graduate. EX 33, p.287. Ms. Sturges also testified that she observed Claimant calculate in his head the effect a minimum wage job would have on his disability income. TR p.73. In addition, Ms. Sturges testified that the position typically does not require a lot of writing. TR pp.83-85. In sum, I find that Claimant does possess the basic skills needed to be a motel desk clerk.

Second, Claimant argues that he does not have the right personality to be a motel desk clerk — he lacks an outgoing personality. Ms. Sturges testified that Claimant's personality fits in with the culture of Roseburg and Coos Bay, and he would be able to deal with customers. TR p.83. I also note that Claimant exhibited a pleasant personality during the hearing. While some jobs, such as a salesperson, might require an outgoing personality, a motel desk clerk requires only the ability to interact with other people. I find that Claimant's personality would not be an impediment to his performance of the job.

Third, Claimant argues that I should accept the findings of Francene Gomez and the Social Security Administration that Claimant is permanently totally disabled. Ms. Gomez, a certified rehabilitation counselor, was assigned by the Department of Labor to work with Claimant in July 1997. In a brief report dated October 8, 1997, Ms. Gomez stated:

MR DAVIS DO [sic] NOT HAVE ANY TRANSFERRABLE SKILLS. HE IS NOT A GOOD CANDIDATE FOR AN ACADEMIC PROGRAM. HE LIVES IN A REMOTE AREA WITH A POOR JOB MARKET.

THIS CASE IS NO LONGER FEASIBLE FOR REHAB SERVICES. CASE CLOSED.

CX 56, p.117.

There is nothing in the record to support Ms. Gomez's conclusions. It is not known how Ms. Gomez evaluated Claimant's medical or work history. Likewise, it is not known what potential types of work she identified for Claimant. In addition, two of Ms. Gomez's conclusions are contradicted by the record. Ms. Sturges found that Claimant possesses 11 transferable skills from his work history and high school education. EX 33, pp.286-287. Ms. Sturges also found that both Coos Bay and Roseburg possess a good job market for motel desk clerks. There is also no evidence in the record as to how the Social Security Administration concluded that Claimant was permanently totally disabled. In sum, I give little weight to the conclusions of both Ms. Gomez and the Social Security Administration.

Fourth, Claimant argues that he could not have obtained any of the job openings identified by Ms. Sturges because the employers hired applicants with superior qualifications. Claimant argues that if he had applied for those positions and not obtained them, the Employer would have failed to establish suitable alternative employment. There is one basic flaw in this argument — Claimant never applied for any of the positions. As such, it is pure speculation whether these potential employers would have chosen other applicants over Claimant.[9] Such speculation does not overcome the fact that these employers indicated that Claimant was qualified for the positions.

Finally, Claimant argues that the job opportunities identified by Ms. Sturges are not compatible with his restriction of working up to only four hours each day. The Employer sent Claimant to Asante Health System in August 1998, for a work evaluation. The work evaluation indicated that Claimant could work four hour shifts as a motel desk clerk. TR 34, p.299. Ms. Sturges testified that she determined that there were suitable part-time motel desk clerk openings. However, she conceded that part-time work may require more than four hours of work on any given day. Ms. Sturges admitted that she failed to inquire whether the employers could accommodate a four hour per day work restriction. TR p.77.

Employer agrees that Claimant can only work 20 hours per week, but it argues that he is not restricted to four hours of work per day. Employer correctly points out that Claimant's first work capacity evaluation by Progressive Rehabilitation Associates in July 1997, did not place any part-time restrictions on Claimant. Rather, Progressive found that Claimant was capable of

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[9]Claimant requested that the record be kept open so that he could do a post-hearing job search. TR pp.17, 87. I denied the request because Claimant had an adequate opportunity to conduct such a search prior to the hearing. TR pp.27, 89.

performing light work. EX 32, p.197. I also note that neither Claimant's treating physician, Dr. Keizer, nor Employer's expert, Dr. Holmes, placed any part-time restrictions on Claimant. However, I agree with Claimant that the work evaluation by Asante is the most persuasive evidence regarding Claimant's ability to physically work as a motel desk clerk. The Asante evaluation specifically simulated the physical requirements of a motel desk clerk job. EX 34, pp.298-299. It recommended that Claimant be limited to four hour shifts because he was having pain and swelling in his left knee during the work evaluation. EX 34, pp.299, 302. In contrast, the Progressive work evaluation did not focus on simulating motel desk clerk work. In addition, there is no suggestion in any medical or vocational report that Claimant has exaggerated his complaints.

In sum, I find that Claimant is restricted to working four hour shifts as a motel desk clerk. The Employer failed to ascertain whether the potential motel desk clerk employers could accommodate such a restriction. As such, Employer has not established the existence of suitable alternative employment. Therefore, I find that Claimant is permanently totally disabled. He is entitled to permanent total disability benefits as of the date of maximum medical improvement, June 7, 1996, at the compensation rate of $738.30 based on an average weekly wage of $1,137.40.

Temporary Total Disability

Claimant argues that he is entitled to temporary total disability benefits for the date November 1, 1993. Claimant argues that Dr. Freudenberg released him to return to work as of November 2, 1993, yet the Employer failed to pay him for November 1. This issue was not raised at the hearing. TR pp.6-7. Instead, Claimant raised this issue for the first time in its post hearing brief.

Under Section 702.336(b) of the regulations, at any time prior to the filing of a compensation order, an administrative law judge (ALJ) may in her discretion, upon the application of a party or upon her own motion, consider a new issue raised by one of the parties. If the ALJ elects to consider the new issue, the parties must be notified and given the opportunity to present argument and new evidence. See 20 C.F.R. § 702.336(b). However, the ALJ in her discretion may elect not to consider the new issue if the motioning party had an opportunity to raise it at the hearing. See *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

Here, Claimant failed to timely raise the issue of temporary disability benefits. Claimant was aware of the periods of temporary disability benefits that the Employer had paid. He stipulated to those payments at the hearing. TR p.5. Claimant had an opportunity to raise the issue at the hearing, but failed to do so. As a result, the Employer was deprived of an opportunity to present evidence in its defense. In addition, Claimant does not offer any excuse for his failure to timely raise the issue. Therefore, I find that Claimant has waived the issue of entitlement to temporary total disability benefits.

And even if Claimant could raise this issue, the record is not clear whether Employer failed

to pay Claimant for that one day. Employer's Notice of Final Payment of Compensation Payments dated December 20, 1993, indicates that it paid temporary disability benefits from "08/25/93 to 00/01/93." EX 5. Employer argues that the "00" is an obvious misprint and should be an "11." The parties stipulated that Employer paid disability benefits from August 25, 1993 to November 1, 1993. It is not clear whether this means "up to and including" November 1.

Claimant also argues for the first time in his post-trial brief that he is entitled to interest for the delayed payments of temporary total disability benefits for July 9, August 23, and August 24, 1993. Claimant argues that Employer did not pay compensation for these dates until January 23, 1996. CX 17. Claimant failed to raise this issue at the hearing, thereby depriving the Employer an opportunity to address this issue. Therefore, I will not consider this issue.

Summary of Compensation Due

Claimant is entitled to temporary total disability ("TTD") benefits for his left knee injury from August 23, 1993 through November 1, 1993 at the rate of $721.14 per week based on an average weekly wage of $1099.02. The parties stipulated that Employer paid Claimant TTD benefits from August 23, 1993 to November 1, 1993 at the rate of $699.96. Therefore, Employer owes Claimant the difference in the rates paid, $21.18 per week, for this period.

Claimant is entitled to TTD benefits for his neck injury from October 5, 1994 through June 6, 1996 at the rate of $738.30 per week based on an average weekly wage of $1,137.00. The parties stipulated that Employer has been paying Claimant disability benefits at the rate of $680.75 per week since October 5, 1994 continuing through the present. Therefore, Employer owes Claimant the difference in the rates paid, $57.55 per week, for this period.

Claimant is entitled to permanent total disability benefits for his neck injury at the compensation rate of $738.30 per week, based on an average weekly wage of $1,137.00, beginning June 7, 1996, the date of maximum medical improvement. Since Employer has been paying benefits at the rate of $680.75 per week, Claimant is entitled to the difference, $57.55 per week, for the periods that Employer has already paid.

The parties have stipulated that Claimant is entitled to a 26% permanent partial disability ("PPD") award for his knee injury. The scheduled disability benefit for total loss of use of a leg is 288 weeks. See Section 8(c)(2). Thus, Claimant is entitled to 74.88 weeks of PPD benefits (26% of 288 weeks), beginning April 24, 1995, the date of maximum medical improvement, at the rate of $721.14 per week based on an average weekly wage of $1099.02. The parties have stipulated that Employer is entitled to a credit of $33,254.97 for previous awards received by Claimant.

Claimant's PPD benefits completely overlaps with Claimant's total disability awards for his subsequent neck injury. Where a claimant sustains an injury which results in an award of permanent partial disability and subsequently suffers a second injury which results in permanent total disability, he may receive concurrent awards for the two disabilities. See *Hastings v. Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir. 1980). However, the combined benefits may not exceed

the statutory limit of 33 U.S.C. § 908(a), two-thirds of Claimant's average weekly wage. See *Brady-Hamilton Stevedore Co. v. Director, OWCP [Anderson],* 58 F.3d 419 (9th Cir. 1995). Since an award of PPD benefits in addition to an award of total disability would exceed the statutory limits of Section 8(a), Claimant is not entitled to an award of permanent partial disability benefits for his knee injury. In addition, Claimant's scheduled PPD award for his left knee was not based on a loss of earning capacity. Claimant's earning capacity was not reduced by the knee injury. In fact, his average weekly wage increased by the time of his subsequent neck injury. As such, Claimant's total disability award at the maximum rate for his neck injury adequately compensates Claimant for the effects of both injuries.[10] Compare *Hastings, supra* (an award of total disability for a subsequent injury did not adequately compensate claimant because the prior injury resulted in a loss of earning capacity; therefore, claimant received concurrent awards of PPD and TD benefits).

The Director, OWCP, has stipulated that Employer is entitled to Section 8(f) relief for permanent disability benefits commencing no earlier than June 7, 1996. The date of maximum medical improvement for Claimant's neck injury is June 7, 1996. Therefore, the Special Fund will be liable for permanent total disability benefits beginning 104 weeks after June 7, 1996.

ORDER AND AWARD

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I issue the following Order:

1. Employer shall pay Claimant temporary total disability benefits for his left knee injury at the compensation rate of $721.14 per week based on an average weekly wage of $1099.02 from August 23, 1993 through November 1, 1993, less credit for prior temporary total disability benefits paid during this period.

2 Employer shall pay Claimant temporary total disability benefits for his neck injury at the compensation rate of $738.30 per week, based on an average weekly wage of $1,137.00 from October 5, 1994 through June 6, 1996, less credit for prior temporary total disability benefits paid during this period.

3 Employer shall pay Claimant permanent total disability benefits for his neck injury at the compensation rate of $738.30 per week, based on an average weekly wage

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[10]I also note that if the scheduled permanent partial disability benefits did not overlap with the permanent total disability benefits, Employer would be entitled to a credit of $33,254.97 pursuant to the parties stipulations. See *Blanchette v. OWCP*, 998 F.2d 109 (2nd Cir. 1993); *Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 195 (9th Cir. 1988). However, since the Employer also seeks Section 8(f) relief, the Special Fund, not the Employer, would be entitled to the benefit of the credit. See *Director, OWCP v. Bethlehem Steel Corp.*, 868 F.2d 759 (5th Cir. 1989); *Blanchette*, *supra*.

of $1,137.00 beginning on June 7, 1996, the date of maximum medical improvement.

4. Beginning 104 weeks from June 7, 1996 and until ordered otherwise, the Special Fund shall pay the Claimant compensation for permanent total disability at the rate of $738.30 per week.

5. The Employer is entitled to reimbursement from the Special Fund for all permanent total disability payments made 104 weeks after June 7, 1996, the date the Claimant's disability became permanent.

6. The Employer shall pay interest on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. §1961.

7. The Director shall make all calculations necessary to carry out this Order.

8. The Employer shall provide the Claimant with all future medical care that is reasonable and necessary for the treatment of the sequelae of the compensable injuries.

9. For legal work done after this case was referred to the Office of Administrative Law Judges, counsel for the Claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for the employer within 21 days of the date this Decision and Order is served. Counsel for the employer shall provide the undersigned and the claimant's counsel with a Statement of Objections to the Initial Petition for Fees and Costs within 21 days of the date the Petition for Fees is served. Within ten calendar days after service of the Statement of Objections, counsel for the claimant shall initiate a verbal discussion with counsel for the employer in an effort to amicably resolve as many of the employer's objections as possible. If the two counsel thereby resolve all of their disputes, they shall promptly file a written notification of such agreement. If the parties fail to amicably resolve all of their disputes within 21 days after service of the employer's Statement of Objections, the claimant's counsel shall prepare a Final Application for Fees and Costs which shall summarize any compromises reached during discussion with counsel for the employer, list those matters on which the parties failed to reach agreement, and specifically set forth the final amounts requested as fees and costs. Such Final Application must be served on the undersigned and on counsel for the employer no later than 30 days after service of the employer's Statement of Objections. Within 14 days after service of the Final Application, the employer shall file a Statement of Final Objections and serve a copy on counsel for the claimant. No further

pleadings will be accepted, unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed. Any failure to object will be deemed a waiver and acquiescence.

IT IS SO ORDERED.

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ANNE BEYTIN TORKINGTON
Administrative Law Judge

San Francisco, California